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In The

Supreme Court of the United States

October Term, 1995

ALVIA E. HESTER, SR. and
BRENDA HESTER, Individually and
BRENDA HESTER as Executrix of the
Estate of ALVINA E. HESTER, JR., Deceased

Plaintiffs/Petitioners,

versus

CSX TRANSPORTATION, INC.

Defendant/Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the United States Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decision rendered by the United States Court of Appeals for the Seventh Circuit in the case *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994)?

B. Whether the United States Court of Appeals for the Fifth Circuit's interpretation of and reliance upon *CSX Transportation, Inc. v. Easterwood*, 507 U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993) is misguided and misplaced?

C. Whether the United States Court of Appeals for the Fifth Circuit's preemption of the Petitioners' state law claims based upon inadequate crossing protection constitutes error?

D. Whether the United States Court of Appeals for the Fifth Circuit's determination that the Secretary of Transportation determined that the safety devices installed at the crossing were adequate constitutes error?

LIST OF PARTIES

1. Alvia E. Hester, Sr., Plaintiff/Petitioner
2. Brenda Hester, Plaintiff/Petitioner
3. Mark D. Lumpkin, Counsel for Petitioner
4. Paul S. Minor, Counsel for Petitioner
5. William S. Guy, Counsel for Petitioner
6. CSX Transportation, Inc., Respondent
7. Raymond L. Brown, Counsel for Respondent
8. Patrick Buchanan, Counsel for Respondent
9. W. Mark Watts, Counsel for Respondent

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

REFERENCES TO OFFICIAL REPORTS OF OPINIONS, DELIVERED IN THE COURTS BELOW ... 1

STATEMENT OF GROUNDS UPON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS BEING INVOKED 1

STATUTES INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 8

ARGUMENT 10

CONCLUSION 15

APPENDIX

Hester v. CSX Transportation, Inc., Slip Op. (5th Cir. 1995) ..... App. 1

Shots v. CSX Transportation, Inc., 38 F.3d 304 (7th Cir. 1994) ..... App. 16

TABLE OF AUTHORITIES

Page

CSX Transporation, Inc. v. Easterwood, 507 U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993) 9, 12, 14

Hatfield v. Burlington Northern RR, 1 F.3d 1071 (10th Cir. 1993) 13, 14

Hester v. CSX Transportation, Inc., ___ F.3d ___ (5th Cir. 1995) 1, 10

Lusby v. Union Pacific Railroad Co., 4 F.3d 639 (8th Cir. 1993) 12, 14

Mahony v. CSX Transportation, Inc., 993 F.2d 211 (11th Cir. 1993) 14

New Orleans & Northeastern Rail Co. v. Lewis, 214 Miss. 163, 58 So.2d 46 (Miss. 1952) 12

Shots v. CSX Transportation, Inc., 38 F.3d 304 (7th Cir. 1994) 1, 9, 10, 14

STATUTES

23 C.F.R. § 646.214 ..... 2, 11, 12, 14

23 U.S.C. § 130 ..... 4, 9

45 U.S.C. § 421 ..... 8, 10

45 U.S.C. § 434 ..... 7, 11, 13

REFERENCES TO OFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The United States Court of Appeals for the Fifth Circuit rendered an opinion in this case which is pertinent to review of the issues presented by this Petition for Writ of Certiorari. This opinion was reported as follows: *Hester v. CSX Transportation, Inc.*, ___ F.3d ___ (5th Cir. 1995). The Hester decision is in conflict with the decision rendered by the United States Court of Appeals for the Seventh Circuit on the same matter in the case of *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994).

STATEMENT OF GROUNDS UPON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS BEING INVOKED

The decree sought to be reviewed is a judgment of the United States Court of Appeals for the Fifth Circuit dated August 21, 1995, and contained in that certain opinion styled *Hester v. CSX Transportation, Inc.*, bearing No. 94-60506.

It is submitted that this case is within the discretionary jurisdiction of this court pursuant to 28 U.S.C. § 1254. This discretion should be exercised in this case based upon the hopeless conflict existing among the Circuit Courts of Appeal concerning preemption of state law claims based on inadequate signalization at railroad crossings.

STATUTES INVOLVED IN THIS CASE

23 C.F.R. § 646.214 Design.

(a) General. (1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice, subject to approval by FHWA.

(b) Grade crossing improvements. (1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) Adequate warning devices, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with

flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

(c) Grade crossing elimination. All crossings of railroads and highways at grade shall be eliminated where there is full control of access on the

highway (a freeway) regardless of the volume of railroad or highway traffic.

23 U.S.C. § 130 Railway-highway crossings

(a) Except as provided in subsection (d) of section 120 of this title and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, except as provided in subsection (d) of section 120 of this title and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case

exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State highway department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects. – Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices. – At least 1/2 of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(f) Apportionment. – Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that total railway-highway crossings in each State bears to the total of such crossings in all States. The Federal share payable on account of any project financed with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report. – Each State shall report to the Secretary not later than December 30 of

each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State repor shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway crossings program.

(h) Use of funds for matching. – Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

45 U.S.C. § 434

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad

> safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

STATEMENT OF THE CASE

On July 22, 1989, Alvia E. Hester, Jr., a 14 year old child, was killed when the car in which he was riding as a guest passenger was struck by a train operated by CSX Transportation, Inc. at the Hatley Circle crossing in Orange Grove, Jackson County, Mississippi. As a result of their son's death, the Hesters filed a wrongful death suit against CSX Transportation, Inc. in Mississippi state court. CSX removed the case to federal court on the basis of diversity of citizenship and then answered the Complaint.

Subsequently, CSX filed a Motion for Partial Summary Judgment asserting that the Hesters' claims against CSX arising from the inadequate warning devices at the Hatley Circle crossing were preempted by the Federal Rail Safety Act of 1970 (FRSA), 45 U.S.C. § 421 et seq. and

the Highway Safety Act of 1973 (HSA), 23 U.S.C. § 130 et seq. CSX's motion was granted and the case proceeded to trial on the remaining theories of negligence. Judgment was entered for CSX on March 25, 1993.

On April 5, 1993, the Hesters filed a Motion for New Trial alleging that the District Court erred in not staying the proceedings until after the Supreme Court's decision in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993) had been decided. On April 21, 1993, the *Easterwood* decision was rendered and on June 7, 1993, the District Court granted the Hesters' Motion for New Trial.

CSX filed a Motion for Reconsideration and on June 14, 1994, the District Court entered an order granting CSX's Motion to Reconsider and reinstated the original judgment. The matter was appealed to the United States Court of Appeals for the Fifth Circuit wherein the Fifth Circuit affirmed the District Court's determination that the FRSA preempted the Hesters' state law claims based on inadequate signalization at the Hatley Circle crossing.

Because of the serious and far reaching implications of the Fifth Circuit's decision, and because it is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit[1] on the same matter, Petitioners request that this Honorable Court grant review and reverse.

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[1] *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994).

ARGUMENT

Writs should be granted by the Supreme Court in this case because the decision by the United States Court of Appeals for the Fifth Circuit in *Hester v. CSX Transportation, Inc.* is in direct conflict to a decision rendered by the United States Court of Appeals for the Seventh Circuit in *Shots v. CSX Transportation, Inc.* The consequences of the holding by the Fifth Circuit in *Hester* will be far reaching and acts as an impermissible limit upon state law tort claims.

The crossing where Alvia E. Hester, Jr. died, is a single track crossing with high speed train operation and limited sight distance. It is not protected by automatic signaling devices, like flashing lights, cantilevers, bells, gates, or any type of train activated warning device of a sort that warns motorists of approaching trains. The crossing was marked with a passive warning device called a crossbuck, the minimum in railroad crossing protection.

The Fifth Circuit held that because federal funds were, apparently, used to install crossbuck signs at crossings across Mississippi, including Hatley Circle, this "presupposes that the Secretary approved and authorized that expenditure, which in turn legally presupposes that the Secretary determined that the safety devices installed were adequate. . . ."[2]

This holding by the Fifth Circuit is contrary to the express purpose of the FRSA, 45 U.S.C. § 421, which is to

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[2] This is in stark contrast to the Seventh Circuit's holding in *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994).

"reduce death and injuries". It is humbly submitted that the legal presupposition invented by the Fifth Circuit is a sorry surrogate for an actual determination that the warning devices in place are adequate for the danger presented. To enhance safety at railroad crossings, such as Hatley Circle, the federal government has adopted regulations which provide specific criteria and procedures which, if adhered to, *assure* that the level of protection at a specified crossing has been determined to be adequate and approved by the Secretary of Transportation. The minimal crossing protection which was in effect at the Hatley Circle crossing was never determined to be adequate by the Secretary of Transportation and no diagnostic team ever recommended that the level of protection at Hatley Circle was adequate. In a nutshell, because the federal regulatory criteria within the contemplation of 23 C.F.R. § 646.214(b)(3) and (4) was not met at Hatley Circle, the Hesters' commonlaw negligence claims for inadequate crossing protection at Hatley Circle were not preempted by federal law.

The use of Federal funds alone is insufficient to preempt state commonlaw remedies. 45 U.S.C. § 434 specifically allows states to continue any "law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order or standard covering the subject matter of such State requirement." The Secretary of Transportation never prescribed crossbucks nor anything else as adequate protection for the crossing in question. The Secretary was never consulted. Because the Secretary never adopted any standard regarding the Hatley Circle crossing, state common law remedies apply. Mississippi

jurisprudence requires railroads to meet the perils presented by dangerous railroad crossings, by increasing warnings, keeping watchmen, or adopting gates or other safety devices. *New Orleans & Northeastern Rail Co. v. Lewis*, 214 Miss. 163, 58 So.2d 46 (Miss. 1952). Additionally, no diagnostic team justified that gates were not appropriate at the Hatley Circle crossing. See 23 C.F.R. § 646.214(b)(3)(ii). Considering the presumption against preemption and the fact that the criteria of 23 C.F.R. 646.214(b)(3) and (4) were not met at Hatley Circle, there is no preemption and the Mississippi commonlaw negligence scheme applies.

The Fifth Circuit's decision does nothing to maximize crossing safety. Rather, by precluding tort liability for the railroad's failure to have adequate safety devices at this crossing when the Secretary never approved crossbucks nor any other specific warning devices for Hatley Circle, the Fifth Circuit has afforded the railroad industry absolute immunity from civil liability. This encourages recklessness, not accountability.

The imposition of commonlaw negligence remedies enhances the express purpose of the FRSA. "Holding railroads liable under a negligence scheme compliments the statutes 'by encouraging railroad – the entities arguable most familiar with crossing conditions – to provide current and complete information to the state agents responsible for . . . improvement projects.' *Easterwood*, 113 S.Ct. at 7039." *Lusby v. Union Pacific Railroad Co.*, 4 F.3d 639, 642 (8th Cir. 1993).

Specifically, the FRSA allows the states to adopt or continue in force any law, rule, regulation, order or standard, relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement. 45 U.S.C. § 434. Because the Secretary has not adopted any rule, regulation, order or standard regarding the warning devices at the Hatley Circle crossing, there is no preemption.

Even if federal funds were expended on this crossing, which is denied, there was never any determination that the minimal warning devices which were installed were adequate for this dangerous crossing.[3] In *Hatfield v. Burlington Northern RR.*, 1 F.3d 1071, 1072 (10th Cir. 1993) that Court held that financial assistance must be a significant event. At page 1072, that Court stated:

> Given the Court's reliance upon a presumption against preemption, *Easterwood*, 507 U.S. 16th, 113 S.Ct. 1739, logic dictates that more than a casual financial connection between the federal government and the project has to exist before that project is governed and circumscribed by federal regulation. Thus, we conclude that a degree of federal participation must be significant.

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[3] CSX Transportation, Inc. created an issue of fact for jury determination wherein it conceded that no federal funds were utilized at the Hatley Circle crossing. Even if funds were utilized on this crossing, the funds were certainly not utilized to upgrade crossing protection.

As this Court has recognized previously, only in those situations where warning devices are installed pursuant to 23 C.F.R. § 646.214(b)(3) and (4), will state law be preempted. As this Court stated, these regulations establish requirements that: "certain protective devices be installed or federal approval be obtained." *Easterwood*, 507 U. S. ___, 123 L.Ed.2d at 400, 113 S.Ct. 1739. In this case, neither were accomplished.

In *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994), the U. S. Court of Appeals for the Seventh Circuit aligned itself with the Eighth, Tenth, and Eleventh Circuits[4] in holding that a Plaintiff's claim for inadequate grade crossing protection was not preempted. That Court observed: "The regulation does not specify particular safety devices at a particular crossing. Rather, it establishes the criteria for determining which safety devices are required at particular crossings." In the current case, "the Secretary has never expressed his approval of crossbucks or any other specific warning devices" at Hatley Circle. *Shots*, 38 F.3d at 307. Because the Secretary of Transportation never approved the level of passive protection at Hatley Circle, no federal intervention occurred and the Hesters' state commonlaw claims are viable. The Fifth Circuit erred in affirming the Lower Court and must be reversed.

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[4] See *Lusby v. Union Pacific Rail Co.*, 4 F.3d 639, 642 (8th Cir. 1993); *Hatfield, supra*; *Mahony v. CSX Transportation, Inc.*, 993 F.2d 211 (11th Cir. 1993).

CONCLUSION

In affirming the District Court's decision holding the Plaintiffs' state tort law claims as being preempted, the Fifth Circuit has rendered a decision contrary to the Seventh, Eighth, Tenth, and Eleventh Circuits. Because of the lack of uniformity, a hopeless conflict exists in the Courts of Appeal concerning the issue of preemption regarding state tort claims based on inadequate signalization at railroad crossings.

Because of the importance of the issues presented herein, which have not been, but should be, settled by this Court, Petitioners respectfully request that this Honorable Court grant the Petition for Writ of Certiorari and reverse.

Respectfully submitted this the 16th day of November, 1995.

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October Term, 1995

ALVIA E. HESTER, SR. and BRENDA HESTER, Individually and BRENDA HESTER as Executrix of the Estate of ALVIA E. HESTER, JR., Deceased

Plaintiffs/Petitioners,

versus

CSX TRANSPORTATION, INC.

Defendant/Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX

Alvia E. HESTER, Sr., and Brenda Hester, Individually and Brenda Hester as the Executor of the Estate of Alvia E. Hester, Jr., Deceased, Plaintiffs-Appellants,

v.

CSX TRANSPORTATION, INC., Defendant-Appellee.

No. 94-60506.

United States Court of Appeals,
Fifth Circuit.

Aug. 21, 1995.

Parents of automobile passenger who was killed in automobile/train collision brought wrongful death action against railroad. The United States District Court for the Southern District of Mississippi, Walter J. Gex, III, J., granted railroad's motion for reconsideration, pursuant to which it reinstated jury verdict in railroad's favor. Plaintiffs appealed. The Court of Appeals, Garwood, Circuit Judge, held that: (1) Federal Rail Safety Act (FRSA) preempted state law claims based on inadequate signalization at crossing, and (2) expert's testimony briefly referencing state's inventory of traffic volume at railroad crossing was harmless.

Affirmed.

Appeal from the United States District Court for the Southern District of Mississippi.

Before REAVLEY, GARWOOD and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiffs-appellants Alvia Hester, Sr. and Brenda Hester (the Hesters) appeal an order of the district court granting defendant-appellee CSX Transportation's (CSX) motion for reconsideration, pursuant to which the district court reinstated the jury verdict in favor of CSX. We affirm.

Facts and Proceedings Below

On July 22, 1989, an automobile in which the Hesters' fourteen-year-old son was a passenger collided with a train operated by CSX at the Hatley Circle crossing in Orange Grove, Jackson County, Mississippi. The Hesters' son was killed in the accident. The Hesters filed a wrongful death suit against CSX in Mississippi state court; CSX removed the case to federal court on the basis of diversity of citizenship and then answered the complaint.

CSX subsequently was granted leave to amend its answer to raise the affirmative defense of federal preemption as to the Hesters' excessive speed and inadequate signalization claims. Thereafter, CSX moved for partial summary judgment as to these aspects of the Hesters' negligence claims. On September 25, 1992, the district court granted CSX's motion, finding that both the excessive speed and inadequate signalization claims were preempted by the Federal Rail Safety Act of 1970 (FRSA), 45 U.S.C. § 421 *et seq.*, and the Highway Safety Act of 1973 (HSA), 23 U.S.C. § 130 *et seq.* Following entry of the district court's order, the Hesters moved for reconsideration and a stay of the proceedings in the case pending the

Supreme Court's resolution of *CSX Transportation, Inc. v. Easterwood*. The district court denied the motion.

The case proceeded to trial on the Hesters' remaining theories of negligence.[1] The jury returned a verdict in favor of CSX, and the district court entered judgment for CSX on March 25, 1993. On April 5, 1993, the Hesters filed a motion for new trial, alleging that the district court erred in not staying proceedings until *Easterwood* had been decided and in admitting certain testimony of CSX's expert witness. On April 21, the Supreme Court issued its decision in *Easterwood*. As discussed more fully below, a crucial issue under *Easterwood* is whether federal funds have "participated" in upgrading the subject crossing; if they have, state law is preempted in certain respects. In a supplemental response to the Hesters' motion for new trial, CSX "conceded that no federal funds were actually used to upgrade the subject crossing." On June 7, 1993, the district court granted the Hesters' motion, determining that, "in the interest of justice, a new trial should be granted."

CSX then filed a motion for reconsideration of the order granting a new trial, asserting that federal funds had in fact been expended in the upgrading of Hatley

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[1] These theories were that the visibility at the crossing was so obstructed by vegetation as to make the crossing ultrahazardous, that the crew failed to keep a proper lookout for approaching motorists, that the train was not blowing its whistle as it approached the crossing, that the crew failed to blow the warning whistle once they spotted the car, and that the crew failed to use reasonable care in timely applying the emergency braking system once they determined that the car was not going to stop.

Circle. The Hesters opposed this motion, and the district court held a hearing on January 27, 1994. Following the hearing, the district court directed the parties to provide further information on whether CSX had participated in diagnostic teams surveying railroad crossings in Mississippi; CSX entered a supplemental filing demonstrating that, contrary to its assertion at the January hearing, it had in fact participated in such diagnostic teams. On June 14, 1994, the district court filed an order determining that CSX had shown that it participated in diagnostic teams to prioritize railroad crossings in Mississippi for improvements and that federal funds were expended in upgrading the Hatley Circle crossing, as required by *Easterwood*. It therefore granted CSX's motion to reconsider and reinstated the original judgment. The Hesters thereafter timely appealed to this Court.

Discussion

On appeal, the Hesters assert that the district court erred in holding that their inadequate signalization claims were preempted by the Supreme Court's decision in *CSX Transportation, Inc. v. Easterwood*, ___ U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), arguing that CSX has not satisfied the preconditions necessary for preemption under Easterwood. The Hesters also claim error in the district court's admission of certain testimony of CSX's expert witness.

I. Federal Preemption of State Law Claims

In Easterwood, the Supreme Court considered whether the FRSA preempted the plaintiff's Georgia common law negligence claim that the railroad crossing at which her husband was killed had inadequate warning signals.[2] Under the FRSA, a state may "adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard *covering the subject matter* of such State requirement." 45 U.S.C. § 434 (emphasis added). In 1973, Congress enacted the HSA, which

> "makes federal funds available to the States to improve grade crossings, in return for which the States must 'conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require . . . protective devices, and establish and implement a schedule of projects for this purpose." *Easterwood*, ___ U.S. at ___, 113 S.Ct. at 1737 (quoting 23 U.S.C. § 130(d)).

The states' eligibility for and use of federal funds is governed by regulations promulgated by the Federal

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[2] Like the Hesters, the plaintiff in Easterwood also asserted a claim of negligence based on the train's allegedly excessive speed. The Court held that such claims were preempted by the FRSA and attendant implementing regulations. *Easterwood*, ___ U.S. at ___, 113 S.Ct. at 1742-42; *but see id.* at ___, 113 S.Ct. at 1743 n. 15 (refusing to determine whether these regulations bar claims for "related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard"). Accordingly, the Hesters have not brought forward their excessive speed claims.

Highway Administration (FHWA). *See generally* 23 C.F.R. pts. 646, 655, 924, 1204. The issue before the Court in Easterwood was whether these regulations "covered the subject matter" of the plaintiff's state law claims and therefore preempted those claims. *Easterwood*, ___ U.S. at ___, 113 S.Ct. at 1737.

The Court noted that the use of the term "covering" in the FRSA's express preemption clause implied a restrictive view of preemption, under which "pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law," and that the context of the provision, which "is both prefaced and succeeded by express saving clauses," manifested a "considerable solicitude for state law." *Id.* at ___, 113 S.Ct. at 1738. The Court thus held that general regulations that do not establish particular requirements governing the installation of warning devices at grade crossings do not cover the subject matter of state tort law and thus could not have preemptive effect.[3] *Id.* at ___, 113 S.Ct. at 1738-40.

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[3] Specifically, the Court held that the regulations of 23 C.F.R. pt. 924, which require states receiving federal aid to establish highway safety improvement programs and set forth the parameters of such programs, did not preempt state law negligence claims against railroads because they spoke only to the duties of the state with respect to grade crossings. Given that the states and the railroads occupied historically distinct spheres of responsibility with respect to grade crossing safety and "that the regulations provide no affirmative indication of their effect on negligence law," the Court held that these regulations did not preempt state negligence law. *Easterwood*, ___ U.S. at ___, 113 S.Ct. at 1739-40. Likewise, it held that the requirement that states comply with the FHWA's Manual on Uniform Traffic Control Devices for Streets and Highways, *see* 23 C.F.R.

The regulations set forth in 23 C.F.R. § 646.214(b)(3) and (b)(4), however, do prescribe such particular requirements.[4] The Court therefore held that, where applicable, these regulations *do* preempt state law:

> "[U]nder §§ 646.214(b)(3) and (4), a project for the improvement of a grade crossing must either

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§§ 646.214(b)(1), 655.603, did not cover the subject matter of state tort law because the Manual itself stated that it was intended only to establish standards for warning device installations, not legal requirements that devices be installed. *Easterwood*, ___ U.S. at ___, 113 S.Ct. at 1740.

[4] Section 646.214(b)(3) states,

"(i) *Adequate warning devices,* under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sign distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable."

include an automatic gate or receive FHWA approval if federal funds 'participate in the installation of the [warning] devices.' Thus . . . §§ 646.214(b)(3) and (4) displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained. . . . In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which . . . seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings."[5] *Id.* at ___, 113 S.Ct. at 1741 (footnote omitted).

Section 646.214(b)(4) provides,

"For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA."

[5] The Court found, however, that the railroad had not established that federal funds participated in the installation of warning devices at the crossing in question. The evidence showed that, although federal funds had been set aside to install a crossing gate, the project had been stalled when the city refused to approve other necessary improvements. *Easterwood*, ___ U.S. at ___, 113 S.Ct. at 1741. Although preliminary circuitry had been installed, the gate was never erected, and the federal funds were allocated to other uses. *Id.* The Court held that this evidence did not establish that federal funds participated in the installation of warning devices at the crossing; the preliminary circuitry was not a warning device under the definition of the regulations. *Id.* (citing 23 C.F.R. § 646.204(i) & (j)).

Pursuant to Easterwood, the test we thus must apply is whether federal funds "participated" in the installation of "warning devices" at the Hatley Circle crossing. If they have, the Hesters' common law claims based on inadequate signalization are preempted.

CSX presented evidence, including Mississippi Department of Transportation (MDOT) records and the affidavit of Newton McCormick, the Office Engineer of the Construction Division of MDOT, showing that from 1981 to 1983 federal funds were approved *and expended* in the upgrading and installation of reflectorized crossbucks, advance warning signs, and advance pavement warning markings at the Hatley Circle crossing. Such passive warning devices fall within the regulations' definition of devices for which federal funds may be expended.[6] *See* 23 C.F.R. § 646.204(i). Having reviewed

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[6] Of course, passive warning devices are not adequate where section 646.214(b)(3) applies, but it seems clear on the facts before us that the applicable provision is section 646.214(b)(4). The Hesters conceded in a supplemental response to CSX's motion for reconsideration that Hatley Circle was a rural crossing and that therefore subsections (A) through (E) of section 646.214(b)(3)(i) were not applicable. In addition, although CSX has adequately demonstrated that it participated in diagnostic teams to study and rank crossings for improvements, there is no record evidence indicating that such a diagnostic team made any recommendations with respect to Hatley Circle. The provisions of section 646.214(b)(3)(i)(F), which contemplates that an automatic gate may be installed if a diagnostic team so recommends, are therefore inapplicable.

Moreover, as our discussion below makes clear, the mere fact that a railroad has participated as a member of a diagnostic team to survey, rate, and rank grade crossings for future improvements is by itself insufficient to establish that federal

the record evidence, we find that CSX has established that federal funds did in fact participate in the installation of warning devices at Hatley Circle.[7]

The Hesters argue that there is no record evidence demonstrating that the Secretary made a determination that these passive warning devices were adequate to protect motorists at Hatley Circle. The statute and regulations preclude this argument. The regulations direct the Secretary to authorize the expenditure of federal funds only on projects that satisfy, *inter alia*, the requirements of

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funds participated in the improvement of the crossing; there must be an actual, authorized expenditure of federal funds in the installation or placement of safety devices at the particular crossing to trigger preemption. *See, e.g., St. Louis Southwestern Railway Co. v. Malone Freight Lines, Inc.*, 39 F.3d 864, 866-67 (8th Cir.1994) (participation occurs only when safety devices are actually installed, not when federal funds are merely earmarked for improvements), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1963, 131 L.Ed.2d 854 (1995); *Bowman v. Norfolk Southern Railway Co.*, 832 F.Supp. 1014, 1019 (D.S.C.1993) (finding no preemption when defendant proved only that crossing had been inspected pursuant to federal program). *But see Hatfield v. Burlington Northern Railroad Co.*, 1 F.3d 1071, 1072 (10th Cir.1993) (participation must be a "significant event," although actual installation is not necessarily required for preemption).

[7] We cannot agree with the Hesters that CSX's earlier concession that no federal funds participated in the installation of the improvements at Hatley Circle creates a fact issue precluding summary judgment. The documentary evidence clearly demonstrates that federal funds did participate in the installation. There is no contrary evidence. We do not take the Hesters to be arguing that this evidence is fabricated or otherwise fraudulent.

federal law, specifically 23 U.S.C. § 109.[8] *See* 23 C.F.R. § 630.114(b). Under that section, "[n]o funds shall be approved for expenditure . . . unless proper safety protective devices complying with safety standards *determined by the Secretary at that time as being adequate* shall be installed or be in operation at any highway and railroad grade crossing . . . " 23 U.S.C.A. § 109(e) (emphasis added). The fact that federal funds participated in the installation of the warning devices legally presupposes that the Secretary approved and authorized that expenditure, which in turn legally presupposes that the Secretary determined that the safety devices installed were adequate to their task.[9] There is no evidence that this did not in fact happen. Nor is there any evidence demonstrating that passive warning devices alone were deemed inadequate (or were not found adequate) to promote safety at Hatley Circle.

We therefore conclude that federal funds participated in the installation of warning devices at Hatley Circle.

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[8] It is the Secretary's authorization that triggers the participation of federal funds. *See* 23 C.F.R. § 630.114(g) ("Federal funds shall not participate in costs incurred prior to the date of authorization to proceed."). Prior to authorization, the Secretary must approve the proposed project, but such approval "does not constitute an obligation of funds, nor establish a date of eligibility for Federal funding." *Id.* § 630.112(c).

[9] We note that the Seventh Circuit seems to have, at least arguably, reached a contrary conclusion in *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir.1994). We do not know precisely what evidence was before the Shots court nor the full facts of that case. Nevertheless, on the facts before us here, we feel constrained by *Easterwood* to find the Hesters' claims preempted.

The Hesters' state law claims based on inadequate signalization at the crossing are therefore preempted.

II. Expert Witness Testimony

The Hesters also allege error in the admission of certain testimony of CSX's expert witness, Dr. Glenn A. Burdick (Burdick). First, they argue that the district court committed reversible error in allowing Burdick to refer to the findings of a state-sponsored inventory of railroad crossings in Mississippi. Under federal law,

> "[R]eports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of . . . railway-highway crossings . . . shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data." 23 U.S.C. § 409 (footnote omitted).

The Hesters claim that Burdick testified in violation of this prohibition when, while describing his *personal* inventory of the traffic volume at Hatley Circle, he mentioned in passing that the state inventory had determined a slightly greater volume of traffic.

We think it highly doubtful that the district court abused its discretion in admitting this testimony. *See EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1092-93 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1252, 131 L.Ed.2d 133 (1995). The statement was made in the midst of an extended narrative outlining Burdick's personal assessment of the amount of traffic at the crossing. This

clearly distinguishes the present case from *Lusby v. Union Pacific Railroad Co.*, 4 F.3d 639 (8th Cir.1993), in which the court found reversible error when the expert's entire opinion as to the safety of the crossing was based on inadmissible inventory evidence. *Id.* at 641. Even assuming *arguendo* that the testimony was erroneously admitted, this general, isolated, passing reference to the inventory (which did not even mention by whom the inventory had been conducted) was undoubtedly harmless.[10]

The Hesters also argue that the district court erred in allowing Burdick to evaluate a set of pictures that the Hesters had earlier entered into evidence to illustrate visibility at the Hatley Circle crossing. Burdick opined that the pictures were misleading and did not accurately depict the conditions at the crossing. The Hesters contend that this testimony was outside Burdick's designated field of expertise.[11] The admission of expert testimony is

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[10] We note too that the findings of the inventory, which found a slightly greater volume of traffic at the Hatley Circle crossing than Burdick's own inventory indicated, were actually more beneficial to the Hesters' case than CSX's.

[11] The Hesters also contend that the admission of Burdick's opinion was particularly egregious given that it was not disclosed to them until trial, thereby prejudicing their ability to adequately cross-examine Burdick. Fed.R.Civ.P. 26(a)(2)(B) provides for the discovery of facts known and opinions held by expert witnesses to be called at trial. However, if an expert's opinion is to be introduced merely to rebut the opposing party's expert's opinion, parties have thirty days from the date of disclosure of that opinion to supplement their discovery responses. Fed.R.Civ.P. 26(a)(2)(C). Under Fed.R.Civ.P. 26(a)(2)(C), supplementation of Burdick's opinion was due by March 8. Burdick's

a matter committed to the district court's discretion, and we will reverse only if we find manifest error. *Rosado v. Deters*, 5 F.3d 119, 124 (5th Cir.1993).

We conclude that, on balance, the district court did not abuse its discretion in allowing Burdick's testimony in this respect. At the time of his deposition, Burdick had already analyzed and expressed an opinion as to photos of the crossing taken only a day or two after the accident that CSX had provided to him. We do not think, therefore, that the Hesters can claim that they were completely surprised by Burdick's asserted expertise in the general field of photo analysis.[12] Significantly, Burdick had made

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opinion was not in fact disclosed to the Hesters' counsel until the day of Burdick's testimony, March 17.

It is committed to the district court's discretion whether to sanction a party for violations of Rule 26(e)(1) by, for example, excluding expert testimony. *Bradley v. United States*, 866 F.2d 120, 124 (5th Cir.1989). In addition, the district court stated its opinion that it did not believe CSX intentionally withheld Burdick's opinion to gain an unfair advantage. This finding is not clearly erroneous. Also, for the reasons discussed herein, we do not think the district court abused its discretion.

[12] The Hesters point to Burdick's direct testimony that "it would require an expert in photo analysis to identify those [the Hesters' photographs] as being of the crossing," but take the comment completely out of context. The comment was introductory to Burdick's (unobjected to) opinion that the Hesters' photos of the crossing purporting to show that vegetation obstructed motorists' view of approaching trains were misleading. Burdick was not stating that *he* was not properly qualified to analyze the photographs, as the Hesters imply; immediately after making this statement, Burdick explained, "With considerable analysis, I could determine where they were taken from and in what direction the camera was pointing . . . "

a personal, on-site survey of the crossing; even a layperson may testify to the accuracy of a photograph of a scene that he has personally viewed.

Moreover, the Hesters did not object to CSX's at-trial tender of Burdick as "an expert in [the] field of accident reconstruction *with the ability to analyze photographs . . .*" (emphasis added). In addition, when counsel for CSX began to question Burdick about the photographs, counsel for the Hesters allowed his testimony to continue for several pages of transcript before objecting;[13] by that time, Burdick had already opined that the photos were inaccurate and misleading.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[13] The Hesters complain that the district court did not allow them to fully state their objection before overruling it. Considering the lateness of this objection, however, we do not think this fact is particularly relevant.

Jason M. SHOTS, Plaintiff-Appellee,

v.

CSX TRANSPORTATION, INCORPORATED, Defendant-Appellant.

No. 94-1290.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 7, 1994.

Decided Oct. 13, 1994.

Motorist who was injured when his automobile collided with train at grade crossing sued railroad for negligence, alleging that it should have made crossing safer by equipping it with automatic gate and flashing-light signals. The United States District Court for the Southern District of Indiana, Gene E. Brooks, J., rejected railroad's preemption defense. Certification of question for interlocutory appeal was accepted. The Court of Appeals, Posner, Chief Judge, held that federal financial assistance in placing reflectorized cross-bucks at intersection in question did not preempt state regulation of crossing safety.

Affirmed.

David V. Scott, New Albany, IN (argued), for Jason M. Shots.

Victor L. Frost, II, Bruce A. Hugon (argued), Frost & Hugon, Indianapolis, IN, for CSX Transp., Inc.

William A. Brasher, Brasher Law Firm, St. Louis, MO, Stephen A. Trimble, Hamilton & Hamilton, Washington,

DC, for Association of American Railroads, amicus curiae.

David W. Stone, IV, Anderson, IN, Daniel J. Harrigan, Bayliff, Harrigan, Cord & Maugans, Kokomo, IN, for Association of Trial Lawyers of America, amicus curiae.

Before POSNER, Chief Judge, and WELLFORD* and EASTERBROOK, Circuit Judges.

POSNER, Circuit Judge.

Jason Shots was injured when the car he was driving collided with a train operated by CSX at a grade crossing in Indiana in 1989. The crossing was equipped only with reflectorized cross-bucks – the familiar warning sign with two crossed arms implanted with plastic disks that reflect a vehicle's headlights at night. Shots brought a diversity tort suit against CSX, charging that the railroad had been negligent in failing to make the crossing safer – to equip it with an automatic gate and flashing-light signals or persuade the state or the municipality to do so. (A railroad grade crossing is the intersection of two rights of way – the railroad's, for the track, and the state or municipality's, for the highway or road that crosses the track – and we do not know which entity has the actual right or responsibility for the warning system.) The railroad interposed the defense that any attempt by the state through its common law or otherwise to regulate safety at this crossing was preempted by the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421 *et seq.*, because the cross-bucks had been installed with federal financial assistance.

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*Hon. Harry W. Wellford of the Sixth Circuit.

The district judge rejected the defense but certified the question for interlocutory appeal under 28 U.S.C. § 1292(b), and we accepted the certification.

No previous case decides whether federal financial assistance alone preempts state regulation of crossing safety. In the wake of *CSX Transportation, Inc. v. Easterwood*, ___ U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), of which more anon, the Tenth Circuit in two cases has held that the financial assistance must be a "significant event" in some as yet not fully defined sense, Armijo v. Atchison, Topeka & Santa Fe Ry., 19 F.3d 547, 550-51 (10th Cir.1994); see also Hatfield v. Burlington Northern R.R., 1 F.3d 1071 (10th Cir.1993), but the cases do not explore the issues that arise once the threshold of establishing federal financial assistance has been crossed. The novelty of the issue presented by the present case – what if anything more must be shown besides federal financial assistance to knock out a state common law or statutory safety requirement for grade crossings – and its financial importance both to railroads and to tort plaintiffs and their lawyers are shown by the filing of amicus briefs by the American Association of Railroads and the Association of Trial Lawyers of America.

The Federal Railroad Safety Act creates a scheme of comprehensive federal regulation of rail safety, including safety at grade crossings, but allows the states to "adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. We must decide whether the Secretary has "cover[ed] the subject matter"

of Indiana's common law of torts, so far as the absence of automatic gates and flashing-light signals at the crossing where Shots was injured is concerned, by a regulation which provides that "on any project where Federal-aid funds participate in the installation of" warning devices at grade crossings the devices must include "automatic gates with flashing light signals" if any one of a number of specified conditions is present. The conditions include "multiple main line railroad tracks," "a high volume of vehicular traffic," and "a diagnostic team recommends [automatic gates with flashing-light signals]." Even if one or more triggering conditions is present, "if a diagnostic team justifies that gates are not appropriate" the Secretary can waive them. 23 C.F.R. § 646.214(b)(3)(ii). If the requirements in subsection (3) (just quoted) for gates plus flashing lights are not satisfied, "the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of" the Secretary. 23 C.F.R. § 646.214(b)(4). The railroad deems subsection (4) applicable and argues that the Secretary approved, or at least should be deemed to have approved, the reflectorized cross-bucks at the crossing where Shots was injured. If this is right, the state cannot require greater or different precautions at the crossing.

The regulation, although subject to the preemption provision of the Federal Railroad Safety Act of 1970, CSX Transportation, Inc. v. Easterwood, supra, ___ U.S. at ___, 113 S.Ct. at 1737 n. 4, was actually promulgated under the authority of a later statute, the Highway Safety Act of 1973, 23 U.S.C. §§ 101 *et seq.* A follow-on to the Federal

Railroad Safety Act, the Highway Safety Act offered federal money for the installation of grade-crossing safety devices to states that would undertake to identify those crossings that might require such devices and to "establish and implement a schedule of projects for this purpose"; hence the need for the diagnostic teams, ordinarily made up of state and railroad safety engineers, to which the regulation refers. 23 U.S.C. § 130(d).

Pursuant to the Highway Safety Act, the State of Indiana made an agreement with the predecessor of CSX in 1975 to "upgrade the passive protection at the Railroad's public rail-highway crossings in Indiana to minimum standards, as established by the State." The agreement covers 2,638 highway crossings and requires the railroad to install (largely at the expense of the state, which is to say of the federal government) reflectorized cross-bucks at all crossings that do not have them and to replace "nonstandard" with standard reflectorized cross-bucks at other crossings. All the new cross-bucks were to be supplied by the state at no charge to the railroad. The agreement was approved by the Secretary of Transportation only five days after regulation 646.214 went into effect, and without a recommendation by a diagnostic team. The crossing at which Shots was injured was one of the crossings at which, pursuant to the agreement, reflectorized cross-bucks were installed. Since this occurred long before the accident took place, and since federal funds "participated" in the installation, the railroad argues that the regulation clicks in and any argument that it was negligent not to have gates and flashing lights is precluded by the preemption provision in the 1970 Act.

The Supreme Court's opinion in Easterwood cites the regulation and states with reference to it that "for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter." ___ U.S. at ___, 113 S.Ct. at 1741. Read literally, as a blanket statement that the regulation prescribes *the* safety devices for all crossings at which federal funds have been used for the installation of some safety device, this passage supports the railroad's position. But we do not think that the literal reading is the correct one. The regulation does not specify particular safety devices at particular crossings. Rather, it establishes criteria for determining which safety devices are required at particular crossings. Because the Supreme Court in Easterwood found that federal funds had not participated in the project at issue in the case, it had no occasion to consider the application of the regulation to particular crossings. Similarly, in the two Tenth Circuit decisions that we cited, the issue was whether the regulation was applicable by virtue of federal financial participation, not whether the regulation, if applicable, actually prescribed a particular safety device at a particular crossing.

The general thrust of the provision of the Federal Railroad Safety Act on preemption is clear enough. If the Secretary promulgates a regulation that covers the subject matter of some state safety requirement, the state requirement must give way (with an inapplicable exception) even if there is no direct conflict, that is, even if the

federal and state requirements would not place the railroad under conflicting duties. If the state fixes a speed limit of 50 m.p.h. and the Secretary of Transportation a speed limit of 60 m.p.h. the state limit is nullified, even though the railroad could comply with both the state and the federal requirement by not exceeding 50 m.p.h. *Id.* at ___, 113 S.Ct. at 1742-44; see also Watson v. Rail Link, Inc., 826 F.Supp. 487, 490 (S.D.Ga.1993). The Secretary was to have the whip hand in specifying safety standards in the railroad industry; the preemption provision itself refers, in a sentence that we did not quote, to the goal of achieving so far as possible national uniformity in those standards. So if the Secretary had prescribed cross-bucks for the crossing at which Shots was injured, Shots could not argue that the common law of Indiana required the railroad to install automatic gates and flashing-light signals. The regulation would have covered the subject matter of highway safety at that crossing.

The Secretary has not prescribed cross-bucks or anything else at the crossing in question, however, and we do not understand the railroad to be arguing, by analogy to cases like Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 774-75, 67 S.Ct. 1026, 1030-31, 91 L.Ed. 1234 (1947), that the Federal Railroad Safety Act gives federal inaction preemptive effect. There is, of course, the regulation; if it can be read, either by itself or in conjunction with the agreement between the state and the railroad, as prescribing the safety devices for the crossing at which Shots was injured, then the Secretary has covered the relevant subject matter and the railroad has a good defense to Shots's suit. There is – we believe the railroad would agree – no such prescription in the

regulation when it is read apart from the agreement. The regulation, as we said earlier, prescribes criteria for selecting safety devices rather than the devices themselves. Subsection (3) requires gates and flashing lights if any of the conditions specified in that subsection exist, unless a diagnostic team recommends against them and the Secretary concurs. There is no indication whether any of the conditions in subsection (3) has ever been fulfilled at the crossing where Shots was injured. Perhaps one or more has been; if so, and if the railroad was in violation of the regulation when he was hurt, then instead of the railroad's using the regulation defensively Shots should be using it offensively. Well, he isn't trying to use it offensively, so we can dismiss the possibility that subsection (3) required gates at this particular crossing and turn to subsection (4). While that provision would not of its own force require the installation of gates and flashing lights, the type of warning device to be installed would be subject to the Secretary's approval, and the Secretary has never expressed his approval of cross-bucks or of any other specific warning device at this crossing. For all that appears, if consulted he would have insisted on automatic gates and flashing-light signals. He was not consulted, and did not approve cross-bucks – unless he should be deemed to have approved them by approving the 1975 agreement between the railroad and the state.

We do not doubt that the Secretary can approve a warning device before or after its installation or that he can make wholesale as well as retail approvals. We may assume as well that he can act through state safety officials as his delegates. We do not think that the fact that the approval of the agreement with the railroad came so

hard on the heels of the adoption of the regulation means that the approval could not have been intended to implement the regulation; indeed, we do not think it appropriate to explore the subjective understandings of the signators. We also agree with the railroad – this is actually a related point – that the preemptive effect of a safety requirement laid down by the Secretary cannot be challenged in a tort suit by arguing to the court that he made a mistake – that he should have imposed a more stringent requirement, or that he should not have acted before hearing the recommendations of a diagnostic team. To allow that sort of collateral challenge to the Secretary's action would put the railroad in an impossible position. It could hardly be asked to challenge the Secretary's specification of the safety devices required at its grade crossings as too lax, and yet if it did not it would be required by law to comply with the specification, thus exposing itself to suit if a tort plaintiff is free to second-guess the Secretary's specification. It is true that if a regulator exceeds his statutory authority or acts arbitrarily, as distinct from making an ill-judged or uninformed or debatable choice, his regulation will not be given preemptive effect. Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153-54, 102 S.Ct. 3014, 3022-23, 73 L.Ed.2d 664 (1982); Ridgway v. Ridgway, 454 U.S. 46, 57, 102 S.Ct. 49, 56, 70 L.Ed.2d 39 (1981); Larsen v. Pacesetter Systems, Inc., 74 Haw. 1, 837 P.2d 1273, 1281 (1992); Toolan v. Trevose Federal Savings & Loan Ass'n, 501 Pa. 477, 462 A.2d 224, 227 (1983). But that is a far cry from anything that could be argued here.

All this does not excuse us from having to *interpret* the agreement, for it is the only evidence of any requirement imposed by the Secretary with respect to the grade crossing at which Shots was injured. We must decide whether, read with the regulation, it constitutes a determination of what warning devices should be required at the thousands of crossings covered by the agreement. If the Secretary has not made a determination – and he has not, unless by approving the agreement – that all these crossings would be adequately protected by reflectorized cross-bucks, then the agreement, viewed as a kind of order or regulation by the Secretary, cannot be thought to have covered the subject matter of safety at Indiana grade crossings. To repeat, the regulation itself, although concerned with safety at all crossings, does not prescribe the safety devices at any; rather, it establishes criteria to which the prescriptions, made later, must conform.

The agreement is limited in scope to "passive" warning devices, a term that excludes gates and flashing lights. 23 C.F.R. §§ 646.204(i), (j). The word "scope" deserves emphasis. The agreement does not state or imply that the thousands of crossings covered by it would be adequately safe if equipped with reflectorized cross-bucks. The point is rather that these are the only form of safety device that the agreement covers. This limitation of scope is reinforced by the fact that the agreement is explicitly limited to providing the "minimum" in passive protections – the minimum being standard reflectorized cross-bucks for crossings, such as the one in question in this case, that lacked even that much in the way of a warning device. Minimum is not a synonym for optimum, or even adequate. We must not forget the

context of the agreement. The State of Indiana had thousands of substandard crossings, and limited funds, even with federal largesse, to bring them all up to the optimal standard of safety. The task was to maximize grade-crossing safety in the state as a whole, subject to a budget constraint, so it was to be expected that adequate safety might be sacrificed at some crossings to enable minimum safety to be achieved at all. So far as can be gathered from the record compiled in the district court, the agreement was a step on the road to adequate safety rather than a determination by the State of Indiana or the federal Secretary of Transportation as to what safety devices would be adequate at each of the thousands of crossings covered by it.

Thus we do not think it can be realistically said, to use the formulation in Easterwood, that "the Secretary has determined the devices to be installed" at these crossings merely because he authorized federal funds to bring them up to minimum standards, utilizing passive warning devices solely. Indeed, it would have been an extraordinary act of irresponsibility for the Secretary of Transportation, by approving the agreement, to preclude tort liability for the railroad's failing to have active warning devices at any of the thousands of crossings covered by the agreement, or otherwise to prevent the state from requiring adequate safety devices at the busiest or most dangerous of these crossings, when no one in the federal government had made a determination that the improvements to be made would bring all the crossings up to a level of safety adequate to satisfy federal standards.

AFFIRMED.

No. 95-791

Supreme Court, U.S.
F I L E D
DEC 21 1995

In The

Supreme Court of the United States

October Term, 1995

ALVIA E. HESTER, SR. and BRENDA HESTER, Individually and BRENDA HESTER, as Executrix of the Estate of ALVIA E. HESTER, JR., Deceased,

Petitioners,

vs.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Is proof required beyond the fact that federal funds participated in an FHWA-approved project for the installation of grade crossing traffic control device in order to preempt a state-law negligence claim based on a railroad's failure to determine the need for, and to install, additional devices at the crossing under *CSX Transportation, Inc. v. Easterwood*, __ U.S. __, 113 S. Ct. 1732 (1993)?

LIST OF PARTIES

1. Alvia E. Hester, Sr., *Plaintiff-Petitioner*

2. Brenda Hester, *Plaintiff-Petitioner*

3. Mark D. Lumpkin, *Counsel for Petitioner*

4. Paul S. Minor, *Counsel for Petitioner*

5. William S. Guy, *Counsel for Petitioner*

6. Raymond L. Brown, *Counsel for Respondent*

7. Patrick R. Buchanan, *Counsel for Respondent*

8. W. Mark Edwards, *Counsel for Respondent*

9. CSX Transportation, Inc., *Defendant-Respondent.*

CSX Transportation, Inc. lists the following non-wholly owned subsidiaries, pursuant to Supreme Court Rule 29(6).

1. Sea-Land Logistics, Inc.

2. Baronial Transportation Corporation

3. Akron Union Passenger Depot Company

4. Allegheny and Western Railway Company

5. Wesjax Development Company

6. Augusta and Summerville Railroad Company

7. The Baltimore and Cumberland Valley Railroad Expansion Company

8. Beaver Street Tower Company

9. Belt Railway Company of Chicago

10. Central Florida Pipeline Corporation

11. Central Transfer Railway and Storage Company

12. Charlotte Terminal Company

13. The Cleveland Terminal and Valley Railroad Company

14. The Central Railroad Company of South Carolina

15. Green Real Estate Company

16. Paducah and Illinois Railroad Company

17. TTX Company Delaware

18. Dayton and Michigan Railroad Company

19. Four Rivers Transportation, Inc.

20. The Home Avenue Railroad Company

21. The Lake Front Dock and Railroad Terminal Company

22. Midland United Corporation

23. Nicholas, Fayette and Greenbriar Railroad Company

24. Norfolk and Portsmouth Belt Line Railroad Company
25. North Charleston Terminal Company
26. Terminal Railroad Association of St. Louis
27. Mahoning State Line Railroad Company
28. The Tylerdale Connecting Railroad Company
29. Winston-Salem Southbound Railway Company
30. Woodstock and Blockton Railway Company
31. General Distribution Services Company
32. Helm-Atlantic Associates, L.P.
33. Energy Dominion
34. Yukon Pacific Corporation
35. Yukon Pacific Company, L.P.
36. James Center Development Company
37. Mid Allegheny Corporation
38. Glebe Road Associates
39. Glebe Road II Associates
40. Glebe Road III Associates

41. Harbour Associates

42. One James Center Associates

43. Richmond Center Associates

44. Richmond Center Associates II

45. St. George Seaport Associates

46. Second Street Limited Partnerships

47. Two James Center Limited Partnerships

48. Washington Harbour Associates Limited Partnerships

49. CSX Professional Services, Inc.

50. Leasing Corporation of Amer1ca Inc.

51. Encompass

52. GLVE Management Corporation

53. GLVE Management Limited Partnerships

54. Genoa Partners

55. Railroad Association Insurance Ltd.

56. Tortuga Casualty Company (5)

57. Transportation and Railroad Assurance Company, LTD.

CSX Transportation, Inc. has listed only its United States non-wholly owned subsidiaries, in the interest of economy. CSX has many foreign non-wholly owned subsidiaries, a listing of which will be provided upon request of the Court.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	vii
Table of Citations	viii
Opinions Below	1
Statutes Involved	2
Statement of the Case	14
Reasons for Denying the Writ	15
I. There is no real conflict between the *Hester* and *Shots* Decisions.	15
II. Recently proposed regulations support the denial of certiorari.	20
Conclusion	23

Contents

Page

TABLE OF CITATIONS

Cases Cited:

CSX Transportation, Inc. v. Easterwood, __ U.S. __, 113 S. Ct. 1732 (1993) ..... i, 1, 16, 19, 20, 21, 22

Elrod v. Burlington Northern Railroad Company, 68 F.3d 241 (8th Cir. 1995) 1

Hester v. CSX Transportation, Inc., 61 F.3d 382 (5th Cir. 1995) 1, 15, 18, 19

Shots v. CSX Transportation, Inc., 38 F.3d 304 (7th Cir. 1994) 2, 15, 16, 17, 18, 19

Statutes Cited:

23 U.S.C. § 106(a) (1992) 14, 18

23 U.S.C. §§ 109(d) and (e) (1992) 14, 15, 18, 19

23 U.S.C. § 130 *et seq.* 15, 16

45 U.S.C. § 421 *et seq.* 15, 16

Other Authorities Cited:

23 C.F.R. §§ 646.204(i) and (j) (1992) 14

23 C.F.R. §§ 646.214 17

Contents

	Page
23 C.F.R. §§ 646.214(b)(3)(i)(C) and (D)	14
23 C.F.R. § 924	21
23 C.F.R. § 924.9(a)(4)	17
49 C.F.R. § 213.9	14
41 Fed. Reg. 11,649-51 (March 2, 1995)	21, 22

No. 95-791

In The

Supreme Court of the United States

October Term, 1995

ALVIA E. HESTER, SR. and BRENDA HESTER, Individually and BRENDA HESTER, as Executrix of the Estate of ALVIA E. HESTER, JR., Deceased,

Petitioners,

vs.

CSX TRANSPORTATION, INC.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit rendered an opinion in this case consistent with this Court's analysis in *CSX Transportation, Inc. v. Easterwood*, 113 S. Ct. 1732 (1993). The opinion of the Fifth Circuit, reported as *Hester v. CSX Transportation, Inc.*, 61 F.3d 382 (5th Cir. 1995), and the progeny it has generated, *i.e.*, *Elrod v. Burlington Northern Railroad Company*, 68 F.3d 241 (8th Cir. 1995), are not in direct

conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994), due to the radically different factual underpinnings of these cases.

STATUTES INVOLVED

23 U.S.C. § 106. Plans, specifications, and estimates.

> (a) Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.
>
> (b) In addition to the approval required under subsection (a) of this section, proposed specifications for projects for construction on (1) the Federal-aid secondary system, except in States where all public roads and highways are under the control and supervision of the State highway department, and (2) the Federal-aid urban system, shall be

determined by the State highway department and the appropriate local road officials in cooperation with each other.

(c) Items included in any such estimate for construction engineering shall not exceed 15 percent of the total estimated cost of a project financed with Federal-aid highway funds, after excluding from such total estimate cost, the estimated costs of rights-of-way, preliminary engineering, and construction engineering.

(d) In such cases as the Secretary determines advisable, plans, specifications, and estimates for proposed projects on any Federal-aid system shall be accompanied by a value engineering or other cost reduction analysis.

23 U.S.C. § 109. Standards.

(a) The Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility (1) that will adequately meed the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality.

(b) The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary in cooperation with the State highway departments. Such standards, as applied to each actual construction project, shall be adequate to enable such project to accommodate the types and volumes of traffic anticipated for such project for the twenty-year period commencing on the date of approval by the Secretary, under section 106 of this title, of the pans, specifications, and estimates for actual construction of such project. Such standards shall in all cases provide for at least four lanes of traffic. The right-of-way width of the Interstate System shall be adequate to permit construction of projects on the Interstate System to such standards. The Secretary shall apply such standards uniformly throughout all the States.

(c) Projects on the Federal-aid secondary system in which Federal funds participate shall be constructed according to specifications that will provide all-weather service and permit maintenance at a reasonable cost.

(d) On any highway project in which Federal funds hereafter participate, or on any such project constructed since December 20, 1944, the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and

traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of the State highway department with the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways.

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

(f) The Secretary shall not, as a condition precedent to his approval under section 106 of this title, require any State to acquire title to, or control of, any marginal land along the proposed highway in addition to that reasonably necessary for road surfaces, median strips, bikeways, gutters, ditches, and side slopes, and of sufficient width to provide service roads for adjacent property to permit safe access at controlled locations in order to expedite traffic, promote safety, and minimize roadside parking.

(g) The Secretary shall issue within 30 days after the day of enactment of the

Federal-Aid Highway Act of 1970 guidelines for minimizing possible soil erosion from highway construction. Such guidelines shall apply to all proposed projects with respect to which plans, specifications, and estimates are approved by the Secretary after the issuance of such guidelines.

(h) Not later than July 1, 1972, the Secretary, after consultation with appropriate Federal and State officials, shall submit to Congress, and not later than 90 days after such submission, promulgate guidelines designed to assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest, taking into consideration the need for fast, safe and efficient transportation, public services, and the costs of eliminating or minimizing such adverse effects and the following:

(1) air, noise, and water pollution;

(2) destruction or disruption of man-made and natural resources, aesthetic values, community cohesion and the availability of public facilities and services;

(3) adverse employment effects, and tax and property value losses;

(4) injurious displacement of people, businesses and farms; and

(5) disruption of desirable community and regional growth. Such guidelines shall apply to all proposed projects with respect to which plans, specifications and estimates are approved by the Secretary after the issuance of such guidelines.

(i) The Secretary, after consultation with appropriate Federal, State, and local officials, shall develop and promulgate standards for highway noise levels compatible with different land uses and after July 1, 1972, shall not approve plans and specifications for any proposed project on any Federal-aid system for which location approval has not yet been secured unless he determines that such plans and specifications include adequate measures to implement the appropriate noise level standards. The Secretary, after consultation with the Administrator of the Environmental Protection Agency and appropriate Federal, State, and local officials, may promulgate standards for the control of highway noise level standards for highways on any Federal-aid system for which project approval has been secured prior to July 1, 1972. The Secretary may approve any project on a Federal-aid system to which noise-level standards are made applicable under the preceding sentence for the purpose of

carrying out such standards. Such project may include, but is not limited to, the acquisition of additional rights-of-way, the construction of physical barriers, and landscaping. Sums apportioned for the Federal-aid system on which such project will be located shall be available to finance the Federal share of such project. Such project shall be deemed a highway project for all purposes of this title.

(j) The Secretary, after consultation with the Administrator of the Environmental Protection Agency, shall develop and promulgate guidelines to assure that highways constructed pursuant to this title are consistent with any approved plan for the implementation of any ambient air quality standard for any air quality control region designated pursuant to the Clean Air Act, as amended.

(k) The Secretary shall not approve any project involving approaches to a bridge under this title, if such project and bridge will significantly affect the traffic volume and the highway system of a contiguous State without first taking into full consideration the views of that State.

(l)(1) In determining whether any right-of-way on any Federal-aid system should be used for accommodating any utility facility, the Secretary shall —

(A) first ascertain the effect such use will have on highway and traffic safety, since in no case shall any use be authorized or otherwise permitted, under this or any other provision of law, which would adversely affect safety;

(B) evaluate the direct and indirect environmental and economic effects of any loss of productive agricultural land or any impairment of the productivity of any agricultural land which would result from the disapproval of the use of such right-of-way for the accommodation of such utility facility; and

(C) consider such environmental and economic effects together with any interference with or impairment of the use of the highway in such right-of-way which would result from the use of such right-of-way for the accommodation of such utility facility.

(2) For the purpose of this subsection —

(A) The term "utility facility" means any privately, publicly, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, power, electricity, light, heat, gas, oil, crude

projects, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public; and

(B) The term "right-of-way" means any real property, or interest therein, acquired, dedicated, or reserved for the construction, operation, and maintenance of a highway.

(m) The Secretary shall issue guidelines describing the criteria applicable to the Interstate System in order to insure that the condition of these routes is maintained at the level required by the purposes for which they were designed. The initial guidelines shall be issued no later than October 1, 1979.

(n) The Secretary shall not approve any project under this title that will result in the severance or destruction of an existing major route for nonmotorized transportation traffic and light motorcycles, unless such project provides a reasonably alternate route or such a route exists.

(o) It is the intent of Congress that any project for resurfacing, restoring, or rehabilitating any highway, other than a highway access to which is fully controlled,

in which Federal Funds participate shall be constructed in accordance with standards to preserve and extend the service life of highways and enhance roadway safety.

23 U.S.C. § 110. Project agreements.

(a) As soon as practicable after the plans, specifications, and estimates for a specific project have been approved, the Secretary shall enter into a formal project agreement with the State highway department concerning the construction and maintenance of such project. Such project agreement shall make provision for State funds required for the State's pro rata share of the cost of construction of such project and for the maintenance thereof after completion of construction.

(b) The Secretary may rely upon representations made by the State highway department with respect to the arrangements or agreements made by the State highway department and appropriate local officials where a part of the project is to be constructed at the expense of, or in cooperation with, local subdivisions of the State.

23 C.F.R. § 646.204. Definitions.

For the purposes of this subpart, the following definitions apply:

(a) *Railroad* shall mean all rail carriers,

publicly-owned, private, and common carriers, including line haul freight and passenger railroads, switching and terminal railroads and passenger carrying railroads such as rapid transit, commuter and street railroads.

(b) *Utility* shall mean the lines and facilities for producing, transmitting or distributing communications, power, electricity, light, heat, gas, oil, water, steam, sewer and similar commodities.

(c) *Company* shall mean any railroad or utility company including any wholly owned or controlled subsidiary thereof.

(d) *'G' funds* signify those Federal-aid highway funds which, pursuant to 23 U.S.C. 120(d), may be used for projects for the elimination of hazards of railroad-highway crossings not to exceed 10 percent of Federal-aid funds apportioned in accordance with 23 U.S.C. 104.

(e) *Preliminary engineering* shall mean the work necessary to produce construction plans, specifications, and estimates to the degree of completeness required for undertaking construction thereunder, including locating, surveying, designing, and related work.

(f) *Construction* shall mean the actual physical construction to improve or

eliminate a railroad-highway grade crossing or accomplish other railroad involved work.

(g) *A diagnostic team* means a group of knowledgeable representatives of the parties of interest in a railroad highway crossing or a group of crossings.

(h) *Main line railroad track* means a track of a principal line of a railroad, including extensions through yards, upon which trains are operated by timetable or train order or both, or the use of which is governed by block signals or by centralized traffic control.

(i) *Passive warning devices* means those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train.

(j) *Active warning devices* means those traffic control devices activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, as well as manually operated devices and crossing watchmen, all of which display to motorists positive warning of the approach or presence of a train.

STATEMENT OF THE CASE

On July 22, 1989, Petitioner's decedent, Alvia E. Hester, Jr., was a passenger in an automobile which failed to stop for a CSX locomotive and train at the Hatley Circle crossing in Orange Grove, Jackson County, Mississippi.[1] (R. 175-177). The Hatley Circle crossing, prior to the date of the accident, had received upgraded warnings in the form of advance warning signs, advance pavement markings, and reflectorized crossbucks. (R. 784-822; 841-843). These warnings were within the federal definition of passive warning devices under 23 C.F.R. §§ 646.204(i) and (j) (1992). The warnings were approved prior to installation by the FHWA. (R. 961-967). Likewise, the warnings installed at this crossing, among others, were subsequently approved by the FHWA after its statewide inspection. (R. 805-809; 817-818). The warning devices approved and installed at the Hatley Circle crossing were paid for by a federal safety funding program. (R. 789-790). Pursuant to the federal regulatory scheme, the State of Mississippi was required, as soon as practicable after program approval, to submit surveys, plans and cost estimates for each individual project that was to be included in a federally funded safety program to the Secretary of Transportation. 23 U.S.C. § 106(a) (1992). After the transmission of the plans and specifications, they must be approved as adequate by the Secretary. 23 U.S.C §§ 109(d)and (e) (1992).

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1. Despite the assertions of the Hesters, Hatley Circle is not a high speed crossing. 49 C.F.R. §213.9 authorizes a speed of only 60 m.p.h. for freight trains on the class 4 track at the subject crossing. Pursuant to 49 C.F.R. §213.9, speeds of 80-110 mph may be authorized for Class 5 and 6 track, respectively. Therefore, as the regulations indicate, the maximum authorized speed at Hatley Circle is only slightly higher than one-half of the possible federal authorized speeds. Hatley Circle is not a high speed crossing. Therefore, the provisions of 23 C.F.R. §§ 646.214(b)(3)(i)(C) and (D) do not apply to this crossing. *Id.*

Pursuant to the agreement between the State of Mississippi and the federal government, which provided the federal funds for the pavement markings, the State of Mississippi contractually agreed that it would not permit any warnings to be installed which did not conform with the federal requirements. (R. 964 at § 11). Further, CSX demonstrated that it participated in the diagnostic review process for the Hatley Circle crossing. (R. 848-849; 999). These diagnostic recommendations were likewise required to be approved pursuant to the regulations prior to the expenditure of federal funds. 23 U.S.C. §§ 109(d) and (e) (1992).

Considering the above information, the District Court held, pursuant to CSX's Motion to Reconsider, that the Hesters' claims against CSX for alleged inadequate warning devices at the Hatley Circle crossing were preempted by the Federal Rail Safety Act of 1970 (FRSA), 45 U.S.C. § 421 *et seq.* and the Highway Safety Act of 1973 (HSA), 23 U.S.C. § 130 *et seq.* This matter was then appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the District Court's findings. The Hesters then petitioned for certiorari in this Court, perceiving a false conflict between the Fifth Circuit's decision in *Hester*, and the United States Court of Appeals for the Seventh Circuit's decision in *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994). CSX respectfully submits that there is no such conflict, given an examination of the respective records.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO REAL CONFLICT BETWEEN THE *HESTER* AND *SHOTS* DECISIONS.

The Hesters assert that the decision of the Fifth Circuit in *Hester* presents a direct conflict with the decision of the Seventh

Circuit in *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994), on the issue of federal preemption. However, a simple analysis of the record below, contrasted with the *Shots* opinion, demonstrates that, at best, there is only an illusory conflict due to the radically dissimilar factual backgrounds of the two cases.

The basis for all preemption analysis is the Federal Rail Safety Act of 1970 (FRSA), 45 U.S.C. § 421 *et seq.* and the Highway Safety Act of 1973 (HSA), 23 U.S.C. § 130 *et seq.*, as well as the regulations issued pursuant to these acts. This Court made the importance of the regulations abundantly clear in *Easterwood*, when it held:

> . . . 23 CFR §§ 646.214(b)(3) and (4) . . . do establish requirements as to the installation of particular warning devices. *Examination of these regulations demonstrates that, when they are applicable, state tort law is preempted.*
>
> * * *
>
> In short, *for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law* which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Easterwood, 113 S. Ct. at 1740-41 (emphasis added).

In *Shots*, the only evidence of record was the IndDot-L&N (the predecessor of CSX) Master Agreement for the crossbuck project. *Shots*, 38 F.3d at 308. The agreement (contract) was created and signed by IndDOT and L&N *prior* to the issuance of 23 C.F.R. § 646.214 (covering devices to be installed where federal funds participate in projects for the installation of grade crossing traffic control devices). *Shots*, 38 F.3d at 306. The agreement was approved by the FHWA/Secretary of Transportation only five days after the regulations were issued and without a recommendation by a diagnostic team.

Clearly, the *Shots* decision was decided in a vacuum, since the decision is based on an analysis of a DOT-railroad master agreement which was written before the promulgation of 23 C.F.R. § 646.214 in 1975, and no other documentation was available to the Seventh Circuit. Because 14 years had passed between the project and the accident, there was virtually no factual information available for the *Shots* project. Notably, in contrast to the present case, *Shots* could not discuss whether the State DOT had a diagnostic team, had begun its required hazard rankings/priority listings for grade crossings,[2] or even what was done with respect to the project.

Because no proof was available, the Seventh Circuit in *Shots* was forced to decide the preemption issue solely on an analysis of the IndDOT L&N agreement, in order to determine whether or not FHWA made any determination of the devices to be installed at the crossing when it approved the agreement for the state-wide project. Given that the agreement central to the *Shots* analysis predated the pertinent federal regulations, the Seventh Circuit

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2. 23 C.F.R. § 924.9(a)(4) specifically requires that state DOT improvement projects consider the relative hazard of railroad grade crossings based on a hazard index formula, and that subsequent projects be undertaken on the basis of a priority system developed by the state DOT. *Id.*

did not analyze the effect of 23 U.S.C. §§ 109(d) and (e), and concluded that FHWA approval of the project was something less than a determination of the adequacy of the traffic control devices. *Shots*, 38 F.3d at 309. These provisions of Section 109 provide that the Secretary may only concur in "such installations as will promote the safe and efficient use of the highways," and that federal funds shall not be approved for expenditure "unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed . . . at any . . . railroad grade crossing . . . with respect to which such expenditures are to be made." *Id.* In the case *sub judice*, the MDOT contractually agreed with FHWA to comply with 23 U.S.C. and all FHWA regulations, and in § 11 specifically acknowledged the requirements of 23 U.S.C. § 109(d). (R. 963-64).

The record in the District Court, and considered by the Fifth Circuit in *Hester*, is remarkably different from the factual vacuum present in *Shots*. The record here demonstrates that the Hatley Circle crossing, prior to the date of the accident, had received upgraded warnings in the form of advance warning signs, advance pavement markings, and reflectorized crossbucks. (R. 784-822; 841-843). The warnings were approved prior to installation by the FHWA. (R. 961-967). Likewise, the warnings installed at this crossing, among others, were subsequently approved by the FHWA after its statewide inspection. (R. 805-809; 817-818). The warning devices installed at the Hatley Circle crossing were paid for by a federal safety funding program. (R. 789-790). Pursuant to the federal regulatory scheme, the State of Mississippi was required, as soon as practicable after program approval, to submit surveys, plans and cost estimates for each individual project included in a federally funded safety program to the Secretary of Transportation. 23 U.S.C. § 106(a) (1992). After the transmission of the plans and specifications, they were required

to be approved as adequate by the Secretary. 23 U.S.C. § 109(d) & (e) (1992).[3]

Pursuant to the agreement between the State of Mississippi and the federal government which provided the federal funds for the pavement markings, the State of Mississippi contractually agreed that it would not permit any warnings to be installed which did not conform with the federal requirements. (R. 964 at § 11). Further, CSX demonstrated that it participated in the diagnostic review process for the Hatley Circle crossing. (R. 848-849; 999). These diagnostic recommendations were likewise required to be approved pursuant to the regulations prior to the expenditure of federal funds. 23 U.S.C. §§ 109(d) and (e) (1992).

The records in the *Shots* and *Hester* cases are in stark contrast to each other. The *Hester* record contains all of the information that the Seventh Circuit lacked to guide its analysis in *Shots*. Had this information been present in *Shots*, and had the Seventh Circuit considered the application of 23 U.S.C. §§ 109(d) and (e)[4], there is no doubt that this Court's decision in

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3. As the secretary has made a determination as to the adequacy of the devices at the Hatley Circle crossing, even the *Shots* opinion would prevent the post-decision challenge the Hesters are attempting. *Shots*, 38 F.3d at 308.

4. This approach is the same as taken by the Solicitor General that "federal funding of an improvement project is the sole trigger of federal preemption" which was adopted by this Court in *Easterwood*. The Solicitor General argued that:

> The scope of 23 C.F.R. 646.214(b) indicated that for federally funded projects the Secretary has covered the subject matter of what safety devices are appropriate. The regulations require gate arms in certain circumstances, and requires FHWA approval of the

(Cont'd)

Easterwood would have been followed. Therefore, it can be seen that there is no real conflict between the Fifth and Seventh Circuits with regard to the preemption issue. Therefore, this Court should deny the Petition for Certiorari.

II.

RECENTLY PROPOSED REGULATIONS SUPPORT THE DENIAL OF CERTIORARI.

It is important to note that, after the case *sub judice* was decided, the Secretary of Transportation proposed federal regulations which would clarify the scope and timing of the preemption of a railroad's common law duty to either evaluate or improve the adequacy of warning devices at a grade crossing. On March 2, 1995, the Federal Railroad Administration proposed regulations that specifically address the allocation of responsibilities between the federal government, the states, and the railroads. These proposed regulations are instructive as to the intent of the Department of Transportation in this area.

The sum and substance of these proposed regulations is that the existence of the federal program, and the participation of the railroad in this program, should preempt any state law duties imposed on railroads to provide additional warning devices at

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(Cont'd)

> safety devices in all other circumstances. Thus, the warning devices in place at a crossing improved with federal funds have, by definition, been specifically found to be adequate under a regulation issued by the secretary. Any state rule that more or different crossing devices were necessary at a federally funded crossing is therefore preempted.

Brief of the United States As Amicus Curiae, p. 27, filed in *CSX Transportation, Inc. v. Easterwood*, __ U.S. __, 113 S. Ct. 1732.

railroad grade crossings. 41 Fed. Reg. 11,649 (March 2, 1995). These regulations would make plain that the various state highway and transportation departments, such as the Mississippi Department of Transportation, and *not* the railroads, are best qualified to assume the responsibility of deciding when and how to improve grade crossing safety.

According to the Secretary of Transportation, decision making by the states, exclusive of the railroads, is the present federal system. 23 C.F.R. § 924. Under the proposed new regulations, this system will continue in operation. 41 Fed. Reg. at 11,649-51. In an explicit final clarification of the preemptive effect of the current and proposed regulations, the Secretary specifically noted that the proposed regulations would "substantially subsume" the subject matter of railroads' selection and installation of highway-rail grade crossing warning systems . . .", therefore preempting state common law. 41 Fed. Reg. at 11,651.

In *Easterwood*, this Court concluded that it was "not prepared to find preemption based solely on the strength of the general mandate of 23 C.F.R. pt. 924". *Easterwood*, 113 S. Ct. at 1740. The Secretary's proposed regulations, which should soon become law, call this part of *Easterwood*'s rationale into doubt. In fact, in his commentary on the proposed rules, the Secretary of Transportation discussed and expressed a contrary view as to this aspect of *Easterwood*. 41 Fed. Reg. at 11,651-52. The proposed regulations would correct that portion of *Easterwood*. In the view of the Secretary, the entire state-driven system of ranking grade crossing hazards and prioritizing the greatest crossing hazards for elimination through improved warning devices triggers federal preemption of common law claims.[5] According

5. The regulatory scheme advocated by the Secretary of Transportation is, in his view, the only way to ensure the investment of "grade crossing (Cont'd)

to the Secretary, preemption occurs *before* federal approval or funding of particular devices. Thus, this Court's focus in *Easterwood*, on federal funding and approval of particular projects as the key preemption events was, according to the Secretary, misplaced. 41 Fed. Reg. 11,651-52.

As may be seen, the proposed regulations would effectively make inapplicable this Court's decision in *Easterwood*, which held that a railroad's state law duties could complement the federal program's procedures for evaluating, rating and upgrading grade crossings. The implication of the Secretary of Transportation's proposed regulation is clear: it mitigates heavily against a grant of certiorari.

If the Secretary's proposed regulations are adopted, then the real issue in this case, the effect of the requirement that the Secretary of Transportation approve the level of protection at crossings where federal funds are used, will have ostensibly been answered by the regulations for all future cases. The questions then proposed in this genre of cases will turn to the correct application of the new regulations. Any decision by this Court in the interim period will impact, at most, only an handful of cases which are currently pending. In the alternative, if the proposed regulations are not adopted, other courts will have an opportunity to consider the preemption issue based on more fully developed factual records. If the pseudo-conflict urged by the Petitioners does in fact emerge in subsequent cases, this Court (should it decide that the issue deserves consideration) will then have the benefit of those courts' analyses and the issues will have been more fully framed.

(Cont'd)
improvement funds where the most lives will be saved and the most injuries prevented." 41 Fed. Reg. at 11,651. Petitioners' inadequate warnings claim, however, would entirely abrogate the laudable safety effort of the regulatory system.

This Court is the final arbiter of the most significant constitutional questions presented in American jurisprudence. As such, the Court faces serious demands on available time and resources. This Court should not grant certiorari in the present situation, where the decision of the Court may very well be of no precedential value. In the interest of comity and judicial economy, it would seem more prudent for this Court to wait and see if the regulations proposed by the Secretary of Transportation are adopted, before the Court decides if it needs to address the very narrow issue of federal preemption at grade crossings raised by Petitioners in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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